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UNITED STATES DISTRICT COURT
DISTRICT OF OREGON

NATIONAL WILDLIFE FEDERATION, et al.,

Plaintiffs

and,

STATE OF OREGON

Intervenor-Plaintiff

v.

NATIONAL MARINE FISHERIES SERVICE, U.S. ARMY CORPS OF ENGINEERS, and U.S. BUREAU OF RECLAMATION,

Defendants,

and

Case No. 01-0640-RE (Lead Case)
CV 05-0023-RE (Consolidated Cases)

MEMORANDUM OF AMICI WARM SPRINGS, UMATILLA, AND YAKAMA TRIBES IN OPPOSITION TO MOTIONS FOR SUMMARY JUDGMENT

NORTHWEST IRRIGATION UTILITIES, PUBLIC POWER COUNCIL, WASHINGTON STATE FARM BUREAU FEDERATION, FRANKLIN COUNTY FARM BUREAU FEDERATION, GRANT COUNTY FARM BUREAU FEDERATION, STATE OF IDAHO, INLAND PORTS AND NAVIGATION GROUP, and KOOTENAI TRIBE OF IDAHO,

Intervenor-Defendants.

COLUMBIA SNAKE RIVER IRRIGATORS ASSOCIATION and EASTERN OREGON IRRIGATORS ASSOCIATION,

Plaintiffs,

v.

CARLOS M. GUTIERREZ, in his official capacity as Secretary of Commerce, NOAA FISHERIES, and D. ROBERT LOHN, in his capacity as Regional Director of NOAA FISHERIES,

Defendants.

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I. INTRODUCTION

For these treaty tribes, the goal of salmon restoration in the Columbia basin is not mere avoidance of extinction. The tribes have a much more ambitious goal -- to restore salmon and steelhead to abundant, sustainable, harvestable levels throughout their range and to their usual and accustomed fishing areas on the Columbia River and its tributaries. These tribes have taken that vision from Congress to courtrooms and everyplace in between, but most importantly they take it to heart. Nobody has fought longer or more diligently for the restoration of salmon than the treaty tribes. Their fight continues, but trying to force yet another remand of the FCRPS BiOp will not be part of that struggle.

Restoration of healthy harvestable salmon runs does not tip on the question of whether or not this or any other FCRPS BiOp contains consensus science underlying each point. That inquiry is neither practical nor legally required nor is it important in the overall scheme of things. Success or failure does not hang in the balance of whether or not this version of the FCRPS BiOp prescribes precisely the right amount of passage spill on any particular spring day at any particular dam. In fact, it's both distressing and enlightening that deeply into the second decade of litigating FCRPS BiOps the challenges of *substance* have essentially cooked down to this small point. The current dalliance with false precision, and the numerous mini-debates among "experts" over differences measured in tenths of percentage points distract from the ultimate goal of robust salmon restoration sought by the tribes. And it is absolutely clear that achieving the tribes' goal of restoring healthy harvestable salmon runs is far removed from the instant debate of whether or not "the recovery prong" of an ESA regulation was properly interpreted and applied in this BiOp or, if one of the *other* previously challenged BiOps (now in convenient and ironic retrospect) actually had it more correct. None of these questions receiving so much attention here really matter. These are the bailiwick and battleground of lawyers.

Admittedly, these tribes have fought the BiOp battles in the past – and important victories for salmon were secured. Those cases seemed to purpose – an action centered argument. The

first cases prompted huge changes in hydrosystem operations and configuration; subsequent cases added habitat restoration, predator control, and the use of supplementation to the restoration arsenal. Most recently, victories brought accountability, collaboration, and massive commitments of additional funding to the effort. For the tribes, the legal fight was always about securing meaningful *actions* to improve salmon.

These tribes believe this case is different. That next significant block of real-world salmon restoration *action* is now committed, and the institutional problems plaguing salmon restoration so glaring in the past have been replaced with collaboration and an attitude of partnership. The tribes did not join these BiOp lawsuits because they saw themselves as private attorneys general, duty bound to police NOAA's application of the ESA. Certainly not because their *real* brass ring was taking out dams, saving whales, or something apart and aside from salmon restoration[1]. Again, for these tribes, challenging the FCRPS BiOps has always been about the salmon. It has been a place where they pressed their demands for a comprehensive, *action-based multi-faceted federal salmon restoration effort*. Things have changed.

We finally have a practical and comprehensive federal salmon plan. It is a plan with actions. It may not be perfect, but it's a plan based on best available science. We have never had this sort of opportunity to *act* for the salmon, and these tribes believe we must seize the moment. With this memorandum the Confederated Tribes of Warm Springs, the Confederated Tribes of the Umatilla Indian Reservation, and the Yakama Nation respectfully ask this Court to lift its eyes from so much of what we believe is noise and minutia, and to consider the reasons that they stand behind 2008 FCRPS biological opinion and the new federal salmon plan. The tribes know from many years in these cases that the Court will carefully consider all presented; and now, in this instance, we urge a different outcome. We respectfully ask that this Court direct the energy devoted to salmon restoration and recovery away from an endless remand planning

[1] Consider the statement of Mr. Tim Weaver, counsel for the Yakama Nation, at the August 21, 2008 status conference: "We're *fish* Indians, not spill Indians!"

and courtroom cycle some seem so determined to perpetuate, and to the streams and rivers where the *salmon managers*, significantly including the tribes, can go to work for salmon restoration.

II. BACKGROUND

These three Treaty Tribes[2] have participated in the ESA litigation for a simple reason - the multiple efforts that constitute the federal government's Columbia River salmon restoration initiative were failing to provide enough real, practical, science-based *action* to improve the condition of depleted salmon. A disproportionate share of the conservation burden was falling on the tribes' treaty reserved right to harvest. In the early 1990's hydrosystem fish operations were embryonic, the federal commitment to salmon habitat restoration was anemic, and hatchery operations were beyond the reach of tribes, dominated by state and federal parties and managed primarily to fuel non-Indian sport and commercial fisheries in the lower Columbia, and along the west coast. The new ESA overlay in the early 1990s and the FCRPS BiOp cases put a needed focus on the hydro "H" – the tribes welcomed that. Now they had a new tool, a new forum to advocate for desperately needed improvements in hydro operations and configuration. But those forums -- that fight -- was always just a piece of their larger effort to press their long-standing demand for a *comprehensive* federal salmon restoration *action* plan.

These tribes participated in support of the challenges to the FCRPS BiOps in each subsequent round of litigation -- 1995, and 2000, and in 2004. The same assessment was made each time – the *actions* offered in the BiOp, considered in the context of the total federal salmon effort, were not adequate to promote the protection and restoration of Treaty protected fisheries. The tribes evaluated the FCRPS BiOps specifically, as well as the larger federal salmon effort on essentially the following points:

- The federal government must develop plans aimed at restoring self-sustaining harvestable salmon and steelhead populations returning to all the Tribes' usual and accustomed fishing areas of the Columbia and its tributaries;

[2] "Treaty Tribes" herein shall mean the Confederated Tribes of the Warm Springs Reservation of Oregon, the Confederated Tribes of the Umatilla Indian Reservation, and the Yakama Nation.

- A robust gravel-to-gravel "All H" *action* plan was necessary;
- Salmon restoration efforts of the federal government must give voice to the tribal peoples and their scientists;
- These tribes must have their treaty rights and co-management jurisdiction respected, and they must be empowered in the salmon restoration effort on the ground;
- Best science and a presumption for action must replace the maddening excuse for delay – a quest for "perfect science" or "consensus science".

These have been the points or pillars for the tribes' analysis and legal arguments. They are the same touchstones they applied to this new 2008 FCRPS BiOp and the totality of the federal government's salmon restoration planning. Today, and for the next 10-years, the federal government's salmon plan passes this test. It is time to go to work.

III. ARGUMENT

A. The 2008 FCRPS BiOp is part of a larger federal salmon protection package

These tribes believe that the federal government has developed a "package" of salmon protection and restoration actions that are based on the best science, are practical, and will work. In 2008, the treaty tribes, federal government and others entered into three unprecedented, coordinated salmon rebuilding commitments.

1. Fishery reductions secured in Pacific Salmon Treaty agreement brings new benefit to Columbia River Chinook stocks.

Under the Pacific Salmon Treaty, the tribes, Alaska, Canada, Oregon, and Washington came to terms on a ten-year agreement of abundance-based Chinook harvest rate reductions. *See* http://www.critfc.org/text/psc/08_agreement.html; *also see* 16 U.S.C. § 3631 *et seq.* (Pacific Salmon Treaty Act). The agreement reduces Chinook catches in the Southeast Alaska fishery by 15% and in the West Coast Vancouver Island fishery by 30%. These reductions in northern ocean fisheries will benefit upper Columbia and Snake River fall Chinook and are a significant

improvement from the 1999 agreement. The agreement includes funding to aid harvest reductions in the Canadian commercial salmon troll fishery. Additional funding improves stock assessments, including estimates of fisheries impacts and escapement.

2. New 10-year Columbia River fisheries management plan addresses ESA while providing for Treaty and Non-Treaty harvest and rebuilding objectives.

With the oversight of the U.S. District Court of Oregon, the parties to *U.S. v. Oregon* reached agreement on a ten-year fisheries management agreement that was entered as an order of the court on August 11, 2008. *U.S. v. Oregon,* 68-513-KI Docket No. (August 11, 2008); http://www.critfc.org/text/press/2008-17USvOR_Mngmt_Agrmt.pdf. The *U.S. v. Oregon* management agreement is the product of many years of negotiations among the parties to the proceeding and integrates U.S.-Canada treaty commitments. *See e.g.* Agreement sections II.B.2 and II.D.5 (concerning ocean fisheries management of summer and fall Chinook respectively). The new fisheries management plans contains abundance-based harvest rate schedules for all stocks that provide for more escapement past fisheries in run-sizes are low, and those harvest schedules explicitly include ESA constraints. The plan includes commitments to artificial production actions that the parties have designed to meet both rebuilding and harvest objectives.

3. Treaty Tribe/Action Agency Accord clarifies, expands, and makes certain habitat actions, production actions, hydrosystem operations and adaptive management/collaboration.

The Memorandum of Agreement among the treaty tribes and Action Agencies concerning the FCRPS Biological Opinion was signed on May 5, 2008 (hereinafter "MOA-Accord"). http://www.critfc.org/cbp/moa.pdf. The MOA-Accord incorporates commitments of the parties in *U.S. v. Oregon* and compliments the actions that they have agreed to. *Compare*

MOA-Accord Attachment B with *US v. Oregon* Agreement Tables B1-B7 (describing hatchery actions and noting funding sources).

The MOA-Accord provides approximately $52 million dollars each year in certain, committed, BPA funding for specifically identified habitat and monitoring and evaluation projects to be implemented by the tribes. MOA-Accord Sect. III.A.2, Att. B, B-1. An additional $52 million dollars is committed by BPA over this 10 years for "capital projects" such as land and water acquisitions and passage improvements that have been specifically identified by the Tribes. *Id.* at Sect. III.A.4, Att. B, B-1. Further, BPA commits another $80 million plus for the construction and expansion of artificial production facilities that are operated by the tribes for shared rebuilding and harvest objectives. *Id.* at Sect. III.B.2, Att.B, B-1. BPA commits another approximate $14 million for the operation of these facilities once they come on line. *Id.* at Sect. III.B.2.[3] The MOA-Accord also commits the Action Agencies to work with the Tribes adaptively, seeking a common approach to analyzing hydrosystem operations and to adaptively managing hydrosystem operations as new data is collected *Id.* at Sect. II.A.2.[4]

Together these three agreements reflect a body of inter-related commitments vital to tribal and coast-wide fisheries management. These three agreements add to and work with the 2008 FCRPS biological opinion and constitute the best, All-H, science-based salmon Columbia Basin salmon restoration initiative that has ever been developed.

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[3] More discussion of the MOA-Accord, particularly how the habitat projects were developed and how their benefits have been calculated is presented in II below.

[4] For example, the specific spring spill/transport operations are "initial" and are subject to revision based on adult returns and SARs, and it is agreed that spill reductions are "an action of last resort" MOA-Accord Sect. II.B.. Other examples of adaptive management in the MOA-Accord are the provisions for commitments for immediate and additional work to identify the effects of John Day Pool drawdown, *id.* at Sect. II.A.2., and for consideration of breach actions if the diagnosis performed in the scheduled comprehensive reviews in 2015 demonstrate that these actions may be necessary to improve the performance of ESUs that would be affected by such actions, *id.* at Sect. IV.A.2.d.

B. The MOA-Accord ensures that habitat projects will be implemented, they will benefit salmon, and they are based on best science.

When the attention finally turns to what the alleged deficiencies of the *substance* of the 2008 BiOp *action* the topic of habitat is addressed by all challenging parties. We will address the common fundamental critique below, but first, it is worth noting that there seems to actually be a major piece of *agreement* that plaintiffs and supporting amicus have with the NOAA and the Action Agencies. There seems to be unanimous agreement that habitat protection is a scientifically sound, legally appropriate, and necessary part of the FCRPS BiOp and the federal government's salmon restoration and recovery plan.

Amicus Nez Perce tribe explains in detail how it sought to have habitat actions that its scientists and biologists included in the 2008 BiOp, and includes a declaration that includes a long list of habitat actions it believes will be beneficial and possibly implemented now and through 2018. Likewise, neither the NWF plaintiffs nor the state of Oregon suggest that habitat actions should not be part of the solution. In fact, in a letter to the Court from counsel, the state of Oregon appears concerned that Bonneville will not reserve sufficient funding for the salmon restoration habitat actions that *it* is currently undertaking and would, apparently, hope to expand upon in the near future.[5] It seems we have this major point of substance settled – habitat actions are a scientifically sound part of the salmon restoration action.

1. The habitat projects in the MOA-Accords will be implemented now and through 2018.

The filings to date from those questioning the certainty of the habitat actions contemplated in the 2008 BiOp focus on the habitat actions called for from the years 2010

[5] See Letter from David Leith, Counsel for State of Oregon to Hon. James Redden, dated October 17, 2008 (sharing apprehension about "the prospects for Oregon's own habitat mitigation **projects**" and acknowledging the funds committed to the "projects" in the several Accords).

through 2018. They acknowledge that Bonneville makes a funding commitment. They acknowledge a commitment to a clearly identified survival improvements. They recognize that the BiOp specifies the categories of habitat actions that will be implemented in those future years. Having to yield to those clear components of the habitat portion of the BiOp, the challengers argue that the habitat component of this All-H BiOp must be disregarded because the particular "*projects*" have not yet been prescribed in detail. But in making the argument about lack of "project" level prescriptions, they steer a wide berth around the Accord-MOA.[6] This is because the argument is invalid.

The Accord-MOA includes project level habitat commitments for the following listed ESUs:

- Middle Columbia River Steelhead;
- Snake River Steelhead;
- Snake River Spring/Summer Chinook;
- Upper Columbia River Spring Chinook;
- Upper Columbia River Steelhead.

The specific habitat actions included in the Accord-MOA relating to those ESUs are identified in Attachment G of the Accord-MOA. The nature of the habitat activity to be undertaken, the entity responsible for implementing the work, and the location of the work at a watershed scale is provided.

[6] The most significant discussion of the Accords is found in footnote 18 of NWF's Memorandum. This footnote actually admits that the Accords (MOAs) include specific habitat "projects" through 2017, in contravention of the general assertion that they are lacking. This footnote discussion also inaccurately states that these projects must be "approved" by the Northwest Power and Conservation Council (NPPC), improperly suggesting an NPPC "veto" that would stop these habitat projects. The actual fact is that the Accord projects will be reviewed by the NPPC and also the Independent Scientific Review Panel (ISRP), and that the NPCC may offer a *recommendation* to Bonneville regarding adjustments or modifications to the projects. However, the decision on whether or not to fund these projects, or any other project outside of the Accords, is finally and exclusively Bonneville's. MOA-Accord Sect. III.D.2. The tribes and Bonneville have committed to considering making reasonable adjustments that the NPPC or ISRP may recommend, but the decision to fund and move forward has been made and remains, under the law, Bonneville's.

It is critical to understand that these specific habitat projects were not developed by bureaucrats or lawyers, or by scientists or biologists working from their Portland or Seattle desks. These projects were identified by the tribe's biologists and managers with boots-on-the ground experience and knowledge of the habitat condition and status and limiting factors for the particular salmon or steelhead populations in issue. Rose Decl. ¶¶ 15-16.

Of course these tribes cannot assume implementation responsibilities for habitat projects outside of areas that they manage, so not every listed ESU population is addressed in their Accord-MOA. However, additional Accords have been developed with the Colville Tribe, the state of Idaho and the Shoshone-Bannock Tribes, and those include commitments for habitat projects for listed Columbia River and Snake River ESUs as well.[7]

Further, the Accord-MOA of the Treaty Tribes/Action Agencies is a *binding* commitment. The Bonneville funding commitment to the habitat actions is subject to detailed dispute resolution procedures, including judicial review for non-compliance. MOA-Accord at 25. Bonneville commits to ensuring that the funding commitments it makes in the Accord-MOA are not reduced based on agency-wide cost-cutting efforts; embedding the costs of implementing it in rate-making processes throughout its term; and commits to other agency cost reductions if necessary to maintain funding for the Accord-MOA. *Id.* In short the funding to enable the habitat projects in the Accord-MOA is secure.

In summary, the claim that the 2010 through 2018 habitat *projects* required to secure survival improvements committed to in the BiOp is currently missing is a gross overstatement.

[7] For example, the Accord with Idaho includes commitments for habitat projects benefitting listed Snake River spring/summer Chinook and steelhead; the Accord with the Colville Tribes includes commitments for habitat projects benefitting Upper Columbia spring Chinook and Upper Columbia steelhead.

While some project-level specification may still be required, an incredibly large piece of that work has been completed in the Accords.

2. The habitat projects will deliver biological benefits.

Even though entwined with the significantly flawed claim the tributary habitat *projects* are lacking, an implied fall-back argument of those challenging the efficacy of the habitat component of the BiOp seems to be that even if the 2010 – 2018 tributary habitat projects *are identified* they will not yield the survival improvements NOAA and the Action Agencies have committed to. With respect to the predicted benefits of tributary habitat projects included in the Accord-MOA, this is simply a debate about what constitutes the "best available science".

However, before getting to the fine-point of that debate, it is worth noting what seems to be a very significant agreement among the parties – that is, that the *methodology* for predicting the survival improvements that can accrue from habitat actions developed by the remand collaboration Habitat Technical Workgroup is a scientifically sound. The declarations of Mr. Rose (submitted herewith), Mr. Bowles (in support of Plaintiff Oregon's arguments) and Dr. Williams (in support of NWF Plaintiffs' arguments) each describe very clearly and consistently the methodology developed in the collaboration process and used in the BiOp for predicting the potential for survival improvements from tributary habitat actions. Rose Decl. ¶¶ 12-31. None of those experts suggest that the methodology is inappropriate or not scientifically sound. None of these experts suggest that there is or was a superior that was available to NOAA or those working in the collaboration process for evaluating tributary habitat salmonid survival potential. Amicus Nez Perce Tribe indicates that it used the methodology in developing the tributary habitat projects it offered in the collaboration process to improve salmonid survival. In sum, the

method used by the Habitat Technical Working Group appears to be unanimously considered scientifically sound.

As described by Mr. Rose and others, the application of the methodology requires expert/professional judgment. Experts must identify the tributary habitat factors that limit biological potential of the focal salmon population. Rose Decl. ¶¶ 12-31. Experts also use judgment and experience to identify the current and potential habitat function in given current in light of current and prospectively treatment of those limiting factors, and convert change in habitat function into predicted survival improvements. *Id.* ¶¶ 17-19, 30-31.

Given that all seem to agree on the method, the "debate" as to whether or not the survival improvements predicted from habitat actions boils down to which "experts" is most capable of providing information about the current status of the habitat, and what can be done to improve it.

The habitat benefits predicted for the tributary habitat projects included in the Accord-MOA use expert tribal biologists and scientists that live and work in these streams everyday. It is true that judgment is involved in applying the accepted methodology, but the tribes strongly assert that the *best available*, judgment is possessed by these boots-on-the ground tribal experts managing the salmon and habitats in these tributaries. Rose Decl. ¶ 24.

The Accord-MOA transparently provides the specific tributary habitat project survival improvements that are predicted for projects implemented in the 2010 to 2018 time frame. MOA-Accord Att. G. In summary, recognizing that there is no challenge to the soundness of the Habitat Technical Workgroup methodology, and given that the tribes' experts are best positioned to contribute the required best professional judgment to its application, the claims that the commitments to tributary habitat survival improvements are overstated sloughs away. The real challenge to the habitat component of the BiOp collapses back into the primary claim that the

actual habitat projects are not and cannot be provided -- an argument that ignores the project commitments of the Accords that is addressed and significantly exposed as inaccurate above.

3. The MOA-Accord, and the 2008 FCRPS biological opinion habitat strategy and projects employ best available science in an imperfect environment.

These tribes are focused on salmon restoration – real, practical, best-science based actions. Their participation in past litigation, their management of salmon with their many partners in the tributaries, their involvement in the court-ordered collaboration process, and their decision to attempt and ultimately successfully develop the additional Accord-MOA with the Action Agencies comes from a resolute focus on real, practical, best-science *action*. To be sure, the tribes' work would be more manageable if relevant data were robust and precise. If there were no reasonable differences of opinion about the state of the science we might quickly find agreement around a restoration plan. If the biology of salmon was better understood, if there wasn't the tremendous environmental variability across time and the range that salmon occupy, the tribes, states, and federal government charged with restoring and recovering salmon would be more efficient. We could be certain that the actions we take would produce the desired results. But that is fantasy – it is not and will not ever be the context in which we join this effort. And it should not be the backdrop against which salmon management and restoration is judged. Mr. Rose comments on the reality confronting those actually involved in the collaboration process:

> *From my view, best available science came in the form of experience, common sense, an appreciation for what realistically can and cannot be done and ultimately, best professional judgments. That was the best we could do given the available resources we had at the time. And, speaking for the Tribes at least, we fully expect to continue this work and improve it over time. . . . It would be great if salmonid ecology was as simple and predictable as Newtonian physics, but it is not and given the circumstances, this was the best the Workgroup could do.* Rose Decl. ¶¶ 44-45.

Developing and implementing an ESA BiOp, or a broader salmon restoration plan such as that sought by these tribes, is decidedly more difficult than critiquing such efforts from a distance and after the fact. The 2008 FCRPS BiOp and the related pieces of the new broader federal salmon restoration initiative outlined above is the best available now. NOAA and the Action Agencies cannot themselves go into the tributary habitat areas and replace blocking, culverts, fence riparian areas, secure in-stream flows, install screens on irrigation structures. They need implementation partners like the Yakama Nation, Idaho, Warm Springs Tribes, Umatilla Tribes, Colville Tribes, and the Shoshone-Bannock Tribe. The Action Agencies and NOAA did the *best they could* to avoid the alleged deficiencies with the habitat component of this All-H BiOp. Just as they do not have authority to do this habitat work themselves, they do not have the legal authority to conscript more implementation partners to round out the remaining habitat projects that they call for in this BiOp.

It is clear however, that others *are* waiting and capable to participate in the regional process that will be used to define more tributary habitat projects for 2010 and beyond. It seems "projects" from others are ready or can be.[8]The funding remains available. There is agreement that repairing tributary habitat benefits listed salmon. The methodology for estimating the benefits that those other projects will provide is also agreed upon as scientifically sound. Absent more willing partners now, the BiOp takes the *best available* approach. We are hopeful that this Court will see the flaws in the critique of the habitat component of the 2008 BiOp and make a decision that preserves the tributary habitat work that it and the Accords will deliver. The possible consequences of requiring the "perfect" envisioned by some are troubling to consider

[8] See Nez Perce Tribe Memorandum and Declaration of Mr. Emmit E. Taylor Jr.

not only for this habitat work, but also for the broader and related components of the other facets of the new federal salmon management plan discussed above.

C. Adaptive management is the appropriate way to take action now even with gaps in scientific knowledge.

Another factor in these tribes' decision not to challenge this BiOp but rather to "get to work" is the adaptive management mechanisms in the Accord- MOA and the BiOp. As previously emphasized, the tribes recognize that the science is not certain on all issues. There is a lack of consensus on many issues, often borne out of inadequate data. Against this backdrop of uncertainty and dispute the tribes believe the BiOp and the Fish MOAs adopt an appropriate adaptive management regime. An important feature of this regime, for the tribes, is the extra layer of reporting and decision-making that the MOAs add to the adaptive management measures set out in Chapter 2.1 of the Biological Assessment (BA).

This regime starts with the recognition that survival improvements must be secured across all the salmon life-stages. Where there is consensus that certain actions will improve population abundance and productivity, those actions are given priority. For actions where data or scientific consensus is lacking actions will still proceed coupled with a commitment to collect information with clear objectives. Those actions will then be adaptively managed as the growing body of data and analysis dictate.

This adaptive management framework, particularly with respect to hydrosystem operations, secured in the Accord-MOA must be emphasized. The Action Agencies have agreed in the Accord-MOA that while the BiOp sets out performance standards for each project and lists specific metrics that will be measured, that is *not* the entire gamut of metrics that will be measured. Spill and transport operations will be driven not only by achieving hydro

performance standards, but also be addressing important other metrics such as smolt-to-adult returns (SAR), spill passage efficiency (SPE) and delay. SAR information will be collected, analyzed and taken into account in adaptively managing spring and summer spill and transportation operations. SAR information will guide system management. Accord-MOA, §§ II.B. and C.

As new biological information is collected, the Tribes and the Action Agencies will meet to analyze that information, and to discuss how it will be used. Under the MOA, the tribes have a "seat at the table" with the federal agencies. The federal agencies have also committed to utilize new biological information as it becomes available "to inform methods and assumptions used to analyze the effects of hydro operations on fish." Ultimately, a new consensus model will be developed, that will build upon the analyses used in the biological opinion "as warranted." *Id.* at II.A.2. An important part of collecting this new information is the Fish Passage Center, the existence and operation of which is secured by the Fish MOA. *Id.* at II.A.3. and II.D.

This adaptive management regime allows the parties to respond to short-term impacts as they develop. It also encourages scientific scrutiny, which will inform the development of the new consensus model. The tribes believe the Action Agencies are committed to this adaptive management regime. This commitment is reflected in the current federal response to the recent review of Snake River spill and transportation conducted by the Independent Science Advisory Board (ISAB 2008). Spill has evolved from a virtually non-existent level at most projects in 1988, in generally increasing amounts through the successive BiOps, culminating in the Court ordered levels of the last three years. NOAA AR B89, App. A., A17-20.

D. Hatchery supplementation programs provide real benefits for the fish

Significantly for the tribes, the new federal salmon plan secures funding for necessary artificial production programs, including supplementation programs. Plaintiffs disparage the use of supplementation programs in restoring anadromous fish runs. Plaintiffs go down this path despite the fact that at least Oregon is a signatory party to the 2008-2017 *United States v. Oregon* Management Agreement, adopted by the Hon. Garr M. King as an Order of the United States District Court for the District of Oregon on August 12, 2008. That Management Agreement provides for many of the very same hatchery supplementation actions that plaintiffs now demean, including the safety-net program in the Upper Grande Ronde.[9] The Treaty Tribes believe that hatchery supplementation is a useful tool in restoring fish runs. This belief is based on decades of actual practices and demonstrated results in tribal watersheds throughout the Columbia and Snake River basins. The benefits of these programs will continue under the BiOp and the Fish MOA. We submit the declarations of tribal biologists Bill Bosch and Gary James to provide a more balanced, and in these tribes' view, more accurate expert opinion on the science, utility, and record of hatchery supplementation than that offered by the Oregon and NWF plaintiffs.

[9] The *United States v. Oregon* Management Agreement contains an extensive list of artificial production actions that all parties – three states, five tribes and multiple federal agencies – agree and have agreed for many years should occur. A primary reason many of these production actions were not fully implemented in the past was a lack of funding. The Fish MOA now secures funding for many of the actions, allowing them to proceed once the consultation in RPA 39 occurs. Most of the production actions have been "in the pipeline" for many years and, as such, the tribal proponents believe the Section 7 consultation will proceed smoothly for the tribal projects. With the funding in place through the Fish MOA, these actions are as certain to occur as possible.

1. The Tribal perspective on supplementation programs.

The Treaty Tribes recognize that fisheries restoration operates against a backdrop of natural, social, scientific and legal uncertainties. Populations and ecosystems are inherently variable in both the short and long term. The legal and social frameworks are similarly variable. Given this high variability and the lack of absolute scientific clarity, some – such as the plaintiffs – would default to inaction or ineffectively minimal action in hatchery operations.

The tribal approach, on the other hand, is to avoid paralysis and proceed in a responsible and flexible manner even where there is scientific uncertainty. This does not mean the tribes are opposed to wild fish, or are advocating irresponsible unconstrained supplementation programs. That is the farthest from the tribal vision. Rather, fishery managers should use flexibility to take actions that will help rebuild and restore Columbia Basin salmon populations before it is too late. Artificial propagation must be applied in concert with other habitat, hydro and harvest actions. It is one tool in an overall restoration plan that used correctly may provide significant advancements. Based on demonstrated successful experience, the tribes believe the responsible use of hatchery supplementation is a valuable tool in the restoration of salmon runs.

2. The responsible use of supplementation programs.

There is no fool-proof and clear-cut single application for use of artificial propagation in restoring natural fish populations. The supplementation program used should be based on the needs and unique circumstances in each subbasin, such as past and current population levels, hatchery history in the area, and the status of the habitat. Adaptive changes such as broodstock selection and acclimation facilities should be implemented to maximize supplementation success. The approach should not be a result of a broad –brush single agency policies or mandates. Finally, the approach should not be driven by research, but should have the

flexibility and an appropriate level of monitoring to evaluate success of the effort and to allow for adaptive management.

3. Demonstrated contributions of hatchery supplementation

Examples of successful tribal supplementation programs include, but are not limited to, spring Chinook programs in the Yakima (Cle Elum Supplementation and Research Facility), Tucannon, Teenaway, Umatilla, Walla Walla and Grande Ronde Rivers; Coho programs in the Yakima River and Mid-Columbia Basin; and steelhead programs in the Umatilla River.

In 1997 the Cle Elum Supplementation and Research Facility collected its spring Chinook broodstock all of which was wild Yakima River origin. This was the beginning of an ambitious multi-generation plan to specifically test the adequacy of spring Chinook hatchery supplementation in meeting production objectives while minimizing adverse impacts to the non-hatchery population. Declaration of William J. Bosch, ¶ 6 (hereinafter Bosch Decl.). Adults have been returning to the Yakima Basin form this program since 2001, with the first F2 generation – the progeny of the CESRF and wild fish spawning in the wild – returning as adults since 2005. The results of this program in terms of abundance and productivity are startling:

- The estimated benefit (defined as an increase in abundance of natural spawners) from this supplementation effort ranged from a low of 13% (return year 2003) to 137% (return year 2006), with an average of 75% from 2001 – 2007. Bosch Decl. ¶ 11.
- Surveys of the upper Yakima River and Naches River (an un-supplemented tributary of the Yakima) reveal that while number of spawners for both rivers increased after the CESRF supplementation efforts started, the average number of redds increased 247% in the supplemented upper Yakima vs. 201% for the unsupplemented Naches River. As Mr. Bosch notes, "the figures are clear that during the 6 years of the study, regardless of ocean conditions, naturally spawning fish increased significantly in the supplemented Yakima arm above those in the unsupplemented Naches." Mr. Bosch goes on to address the "ocean conditions" issue: "Thus, it is incorrect for anyone to assert that abundance increases in supplemented streams are solely due to ocean conditions and not, at least in part, to supplementation." Bosch Decl., ¶ 15.

- Based on Yakima River adult returns from the 1997-2003 broods, naturally reared salmon produced only 1.1. adults for every spawner, while supplementation fish produced 5.2 adults. Bosch Decl. ¶ 13.

The Tucannon Fish Hatchery operated by the Washington Department of Fish and Wildlife (WDFW) is another carefully monitored program using local broodstock observed similar results regarding productivity between "wild" fish and hatchery origin. Based on adult returns for the 1985-2002 brood years, wild salmon produced only 0.6 adults for each spawner, while fish produced 1.7 adults. Bosch Decl. ¶ 7, ¶13.

Through the CESRF and similar supplementation programs, tribes have learned that where significant habitat improvements occur contemporaneous to or prior to supplementation efforts, it appears that supplementation is able to greatly increase the numbers of natural fish in the river.

> *As a critical component of the CESRF program, the Yakamas are implementing significant habitat improvements in the river so that when the fish return they have much improved spawning and rearing conditions, which I and others on our team believe contribute substantially to the ongoing success of this program. This is precisely the type of combined effort that will be implemented in the mid and upper Columbia under the BIOP and the MOA. Like the "Field of Dreams," the intent is to not only build the field (habitat improvement), but also to go a step further and provide the bats and balls (supplementation) so that "they will come."*

Bosch Decl., ¶ 17. The increased benefits of hatchery supplementation paired with high quality habitat is not limited to Yakama's CESRF program, but has also been observed in the Walla Walla River. Declaration of Gary James, ¶ 35 (hereinafter James Decl.).

Tribal programs have also successfully reintroduced populations that were extirpated for as long as a century. Coho were reintroduced to the Yakima River in a feasibility project starting in 1996, using stocks that had been reared in hatcheries for multiple generations. The results of this project demonstrated that hatchery-origin Coho were able to reestablish themselves after as

few as 3-5 generations of supplementation in the wild. This program "increased the number of natural-origin Coho spawners in the Yakima from zero to an average of over 1,000 fish annually over the course of this process, a rather stunning example of the use of carefully planned and executed supplementation programs." Bosch Decl., ¶¶ 19-22.

Similar Coho reintroduction efforts were made in the mid-Columbia, in the Wenatchee and Methow Basins where Coho were functionally extinct as recently as 1998. This supplementation plan for the mid-Columbia, following the template of using "domesticated" lower river stocks to establish a mid-Columbia broodstock, returned over 16,000 fish to Rock Island in 2007, many of which were destined to spawn in the wild. Mr. Bosch pointedly states the undeniable:

> *These fish, supposedly "unfit" in the opinion of many supplementation critics, were able to travel downstream through 7 dams, survive one to two years in the ocean and return back upstream through those seven dams to their stream of origin. This is another example of a stunning revival of an extirpated stock using careful and well implemented supplementation concepts and programs.*

Bosch Decl., ¶ 23.

Reintroduction efforts with spring Chinook met similar success in the Umatilla, Walla Walla and Grande Ronde basins. In the Umatilla, a run that was extinct for nearly one hundred years now has annual returns of 4,000 – 5,000 fish, 1,000 of which are destined to spawn naturally in the upper Umatilla River. While this run is not yet self-sustaining, it is demonstrating significant progress towards that goal as the CTUIR continues to implement adaptive management improvements. James Decl., ¶¶ 29-30.

In the Walla Walla River, the site of another grisly 100 year extirpation, the first out-planting of hatchery adults into a stretch of high quality spawning and rearing habitat occurred in

2000. The results: a near-replacement level return of 350 naturally produced adults in 2004, from a single year of supplementation. High numbers of hatchery origin natural spawners have continued. This productive seeding effort will be expanded under the Fish MOA, to the point where the CTUIR expects annual hatchery returns of 2,750 spring Chinook to seed natural production. [James Decl.,¶¶ 34-36.] Like the Teenaway River efforts discussed above, this program highlights the potential low hanging fruit that high quality habitat paired with supplementation can yield.

Hatchery fish were used to reintroduce spring Chinook to Lookingglass Creek in the Grande Ronde basin in the 1990s. The survival success of the first generation of naturally produced hatchery stock, even though it was non-endemic, were on par with similar survivals of endemic stocks within that very same tributary across all life history stages (adults per redd, juveniles per redd, smolt timing and survival rate to Lower Granite Dam, next generation adult returns).[10] James Decl., ¶ 37.

In addition to the programs discussed above, the Nez Perce Tribe been the lead in a Snake River fall Chinook supplementation program in which yearlings and sub-yearlings from Lyons Ferry are out-planted to acclimation sites at Pittsburgh Landing and Captain John's Rapids on the Snake, and at Big Canyon on the Clearwater River. Since the program began, abundance of fall Chinook returning to Lower Granite has increased dramatically, from a low of 78 natural spawners in 1994 to over 4,000, and holding steady at the 2,000 – 3,000 range. Bosch Decl., ¶¶ 24-25. Thus, it appears that the returning numbers of fall Chinook in the in the Snake River above Lower Granite dam maybe be positively influenced by recent supplementation efforts.

[10] The Lookingglass Creek run was studied in the 1960s, prior to extirpation. These studies provided data sets which could be used for comparison purposes.

Empirical studies that go beyond the few programs mentioned above document that carefully planned and implemented hatchery supplementation programs tailored to the conditions of the particular subbasin have increased spatial structure of natural-origin spawners; have minimal adverse (or in some cases positive) impacts to reproductive fitness parameters, genetic or ecological diversity; and that any potential adverse phenotypic effects of domestication due to long-term hatchery influence can be reversed in relatively short order with re-introduced wild influence. Bosch Decl., ¶ 32. Mr. Bosch briefly reviews and synopsizes some of these empirical studies that extend far beyond the programs recited above at paragraph 31 of his declaration. A few selected highlights of Mr. Bosch's synopses include:

- "Steelhead from a supplementation hatchery (reared in a supplementation hatchery and then allowed to spawn naturally in the wild) had reproductive success indistinguishable from that of wild fish."

- "[U]nder the right conditions, outplanted adult hatchery fish taken from localized hatchery stocks can contribute to the overall juvenile production in a natural stream."

- "This study documents that Skamania Hatchery-origin steelhead have naturally produced offspring that are returning to spawn in a northern Puget Sound river basin. The study also suggests that the naturally produced offspring of the Skamania hatchery-origin fish may be increasing the overall number of alleles present in the natural population, thus enhancing overall genetic diversity."

- "[The] data support the idea that a single generation of state-of-the-art conservation hatchery propagation can produce fish with reproductive traits similar to those of wild fish, given comparable body size".

- "The mean adult-to-adult return rate of hatchery-reared steelhead exceeded replacement and that of the naturally-spawning population. Although the smolt-to-adult survival rates of hatchery-reared fish fluctuate, salmonid escapement has increased in recent years, permitting steelhead and spring Chinook harvest. Enumeration of potential spawners and observed redds reveals an increase in natural production of all supplemented species."

These Treaty Tribes discuss the benefits of supplementation at such length because while these programs deliver real benefits to listed and unlisted populations, one would not know that by the faint praise they receive in plaintiffs' (and, in truth, sometimes the federal) scientific stream. Mr. Bosch provides a realistic, science and experience-based assessment of just what supplementation offers:

> *In conclusion, it is my opinion that supplementation programs such as those carried out by the Yakama Nation and the other programs described in this declaration, especially when paired with the habitat recovery programs set forth in the Biological Opinion and the Fish Accord MOA's, are scientifically valid methods of increasing naturally spawning listed salmon and steelhead populations. Experience and the literature suggest that success for supplementation programs is most likely when fish are taken from local, natural-origin fish. This will be the case in the mid and upper Columbia, where programs will begin with broodstock taken from listed fish from the streams to be supplemented, due to the availability of the fish and trapping facilities. This will be a huge benefit to getting the programs up and running in a much shorter period of time than if we had to start from scratch in developing a proper broodstock.*

Bosch Decl., ¶ 33.

IV. CONCLUSION

These tribes believe we have a historic opportunity before us. The federal government has, with the 2008 BiOp, the Accords, a *US v. Oregon* management agreement and a new Pacific Salmon Treaty Chinook agreement a comprehensive, best available science based, gravel-to-gravel salmon restoration plan. The tribes believe that is appropriate to consider the sum of this plan, rather than small elements of one component. Our choice is to either dedicate our efforts over the next decade to implementing this broad federal salmon plan, or to deny these linkages and reject the opportunity we have in favor of tearing the pieces down one-by-one in litigation.

These tribes hope that we can go to work. The MOA-Accord, in combination with the 2008 BiOp and *US v. Oregon* agreement, uses tribal science, best available science and information, and addresses salmon restoration challenges wherever they occur. We urge a period

of action. Consider these remarks from Mr. Ron Suppah, Chairman, Warm Springs Tribal Council, reflecting on the collaboration effort used to develop the 2008 BiOp and the MOA-Accord at the Accord signing ceremony held on the banks of the Columbia on May 2, 2008:

> We worked hard. We negotiated past old positions. We built trust, bit by bit. And we have reached an accord that is historic, will help salmon, and will join us on the river with a common purpose like we have never had before. It is a good day to stand here near the river, and with old and new partners in our work.
>
> This is an accord with real benefits. For Warm Springs, we will redouble our efforts in the John Day, Deschutes, Hood River and other streams. Our energy and resources can go on the ground here. Others may not see their way through as we have, but we will not let our clear vision on what must be done be clouded. We will be working for salmon, steelhead, and eels in the rivers – we hope that others will see that the long-term solutions are found in this work and not at the courthouse.
>
> Our new partnership with the federal government is historic. This river has long been a symbol for our disputes, our divided goals, our adversity. Today we stand along it in the spirit of reconciling, and finding common goals, and joining our voices and might as sovereigns. We have much to fix, much to accomplish – this is a long-term work before us. We have to join together to reach our goals. This ten year accord may be only a beginning, but it is a critical beginning. And if we accomplish what we believe we will for the salmon living in this river, the memories of adversity may fade and be replaced with thoughts of hope, optimism, and shared success.

DATED this 24th day of October, 2008.

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by causing a full, true, and correct copy thereof to be sent by the following indicated method or methods, on the date set forth below:

☐ by mailing in a sealed, first-class postage-prepaid envelope, addressed to the last-known office address of the attorney, and deposited with the United States Postal Service at Bend, Oregon.

☐ by hand delivery.

☐ by sending via overnight courier in a sealed envelope.

☐ by faxing to the attorney at the fax number that is the last-known fax number for the attorney's office.

☒ by electronic service pursuant to LR 100.7.

DATED this 24th day of October, 2008.

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